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IN THE

Supreme Court Of The United States

No. 75-911

Frank Douglas Ward ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PARAGON PRINTING CO., LITTLE ROCK

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IN THE

Supreme Court Of The United States

No.

Frank Douglas Ward ..... *Petitioner*

V.

Unites States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on October 30, 1975.

JURISDICTION

The judgment of the Circuit Court of Appeals was returned on October 30, 1975. An extension of the time for filing the instant petition was granted on Nov. 26, 1975, extending to December 29, 1975, the time for filing

the instant petition. The jurisdiction of the Court is invoked under 28 U.S.C. Sect. 1254 (1).

QUESTION PRESENTED

Whether the evidence presented against petitioner was sufficient to overcome petitioner's presumption of innocence so that petitioner's constitutional rights, afforded by the 14th Amend. to the Const. of the United States were fully protected.

STATUTE INVOLVED

The statutory provisions involved are 18 U.S.C. 371; 18 U.S.C. 152. They are printed in Appendix A, infra, p.p. .

STATEMENT

Petitioner is a rancher and salesman, having sold furniture and sewing machines over a period of some twenty years. During the later part of 1973, petitioner went to work for Johnnie Slingerland and William Francis Wilson selling sewing machines. Around the first part of 1974 Slingerland and Wilson started a furniture salvage business called Factory Surplus and Freight Sales and Ward, petitioner herein, was hired as a sales manager. His duties were exclusively in the area of sales and sales management.

From the record of the District Court trial it is clear that Ward had *no ownership interest*, (emphasis added) in FSFS. He simply was in charge of sales.

Sometime during March or April of 1974 petitioner decided to leave FSFS and go into the surplus and salvage business on his own in Texarkana, Texas. This location was selected due to better interest rates and better economic conditions as compared to Arkansas and Little Rock in particular.

Petitioner purchased a quantity of furniture from FSFS. He located a business house in Texarkana, Texas. He opened a bank account in "Wards Furniture" and commenced to do business. In the meantime, FSFS had started having financial problems due to the loss by FSFS of their credit line with General Electric credit corporation. FSFS needed the money owed to it by Ward, so Ward, in an effort to create faster sales and a flow of cash, sold three lots of furniture at auction.

Testimony in the record of the District Court trial was to the effect that *all petitioners business dealings were open and above board*, (emphasis added) Petitioners were introduced at the various auctions as the owner of the furniture. The furniture had been advertised by the auctioneers and specifically identified as to description and ownership. The prices brought for the furniture were reasonable and considered fair market prices by the auctioneers. Payments were made by check to petitioner who in turn paid FSFS what he owned them, by check.

Petitioner was never a party to any bankruptcy proceeding involving FSFS, Slingerland or Wilson. Petitioner had no knowledge of any bankruptcy proceeding, was never served with any type of legal document such as a restraining order or injunction and in no way did the acts of petitioner constitute fraud against any creditor of FSFS.

District Court records indicate petitioner left FSFS sometime in March or April of 1974. At the time FSFS was solvent, doing a high volume of business, paying its bills and conducting a normal business operation. *Petitioner had no knowledge of any impending involuntary bankruptcy proceeding to be filed by a small group of creditors of FSFS.* (Emphasis added)

William Francis Wilson testified in District Court that petitioner originally had discussed a "scam" type furniture operation with Wilson and Slingerland. There was *nothing in the record* (emphasis added) to corroborate this, in fact, the record clearly refutes Wilson's testimony in every aspect.

REASONS FOR GRANTING WRIT

I.

Even if petitioner had had knowledge, at one time, of an intended conspiracy, this knowledge is not sufficient to sustain petitioners conviction. In *U.S. v. Falcone*, 109 F. 2d 579 (2d Cir. 1940), affd. 311 U.S. 205, 61 S. Ct. 204, (1940) the Court held that knowledge is not

sufficient for guilt of conspiracy. The Court said "it is not enough that he does not forego a normal lawful activity, of the fruits of which he knows that other will make an unlawful use; *he must in some sense promote their venture himself, make it his own*, have a stake in the outcome."

Petitioner had no stake in the outcome of any venture of FSFS, Slingerland or Wilson. Petitioner had already left FSFS some months previously. Petitioners only interest was in the normal profit he made after the sale of furniture, which he had lawfully purchased, and after paying FSFS what he, petitioner, owed. There were no collateral liens or mortgages attached to any of the furniture purchased by petitioner. The question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abbettor of—the buyer because he knows that the buyer means to use the goods to commit a crime. *U.S. v. Falcone*, 108 F. 2d 579, 581 (2d Cir. 1940)

II.

The acts done by petitioner were not overt acts in furtherance of the conspiracy. Not only must there be an agreement, but also overt acts, whether legal or illegal, must be performed in furtherance of the conspiracy.

As Professor Perkins stated "the substantive acts of one conspirator, *in furtherance of the conspiracy*, must be imputed to his co-conspirators insofar as they were members of the conspiracy *at the time the acts were*

committed." Perkins, "The Act of One Conspirator" 26 Hastings L.J. 337-359 (1974) (emphasis added).

Clearly from the record of the District Court it can be seen that the acts of petitioner could in no way be construed as acts in furtherance of a conspiracy.

III.

There was no "corrupt intent" on the part of petitioner in doing those acts performed by petitioner. Therefore, petitioner cannot be said to be guilty of conspiracy. *Landers v. U.S.*, 299 F. 75 (6th Cir. 1924).

IV.

The holding of the 8th Cir. Court of Appeals that an alleged conspirator can be convicted solely on the uncorroborated testimony of an alleged co-conspirator totally violates the spirit and meaning of the constitutional rights of citizens as afforded by the due process clause of the 14th Amend. To hold such is clearly a judicial procedure for "sticking the head in the sand" and dodging the real issue, the guilt or innocence of a citizen. Even most state courts recognize the danger in such a judicial philosophy, and most states hold that without corroboration a co-defendant can not be convicted on the statement of a co-defendant. There can be no fairness in such a judicial principle that will allow one to be convicted simply on the uncorroborated testimony of an alleged co-defendant.

The due process clause of the 14th. Amend. is not limited to those specific guarantees spelled out in the Bill of Rights but rather contains *protection against practices and policies* which may fall *short of fundamental fairness* without running afoul of a specific provision. (emphasis added.) In re *Winship*, 397 U.S. 358, 377 (1970).

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Little Rock, Arkansas

Counsel for Petitioner

APPENDIX A

1. 18 U.S.C. Sect. 371—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. Sect. 152—Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or . . . .

APPENDIX B

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1223 September Term, 1975

Filed
October 30, 1975
Robert C. Tucker
Clerk

United States,

Appellee,

vs. Appeal from the United States District Court for the Eastern District of Arkansas

Johnnie Lee Slingerland,
Paul Ray Jarnigan,
William Francis Wilson,

Frank Douglas Ward,

Appellant,

Joseph Micciche, Sr.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas and typewritten briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

October 30, 1975

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 75-911
No. 75-912

Johnnie Slingerland ..... *Petitioner*
Frank Douglas Ward ..... *Petitioner*

V.

United States of America ..... *Respondent*

APPENDIX TO PETITION

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IN THE

Supreme Court Of The United States

No. 75-911
No. 75-912

Johnnie Slingerland ..... *Petitioner*
Frank Douglas Ward ..... *Petitioner*

V.

United States of America ..... *Respondent*

APPENDIX TO PETITION

No. 75-1220
No. 75-1221
No. 75-1223
No. 75-1224

United States of America, Appellee,	*	Appeal from the United States District Court for the Eastern District of Arkansas.
v.	*	
Joseph Micciche, Sr., Paul Ray Jarnigan, Frank Douglas Ward, and Johnnie Lee Slingerland	*	
Appellants.	*	

Submitted: September 9, 1975.
Filed: October 30, 1975.

Before VAN OOSTERHOUT, Senior Circuit Judge; BRIGHT and ROSS, Circuit Judges.

PER CURIAM.

The four appellants challenge their conviction by a jury of conspiring to knowingly and fraudulently transfer and conceal assets in contemplation of a bankruptcy proceeding and with intent to defeat the bankruptcy law. 18 U.S.C. §152. The sole issue raised is sufficiency of the evidence. We affirm the convictions of appellants- William Ward and Johnnie Slingerland, but reverse those of Paul Jarnigan and Joseph Micciche, Sr.

There was clearly sufficient evidence to support the convictions of Ward and Slingerland. Government witness-William Wilson testified that he, Ward, and Slingerland expressly agreed to conduct a scheme to defraud creditors which he termed a "scam." The basic idea of the "scam" was to establish good credit, order a large inventory, dispose of that inventory for whatever it would bring, and then disappear.

This scheme was carried out essentially as planned. A furniture store was established in December of 1973, under the name of Factory Surplus and Freight Sales (FSFS). Several branch stores were also

established. FSFS did a rapidly increasing business in inexpensive furniture sold at very low prices. In April of 1974, a huge inventory began to arrive. Also, in mid-April, the company that had been financing many of FSFS' credit sales severely curtailed the amount of recourse paper it would accept.

Much of this inventory was stored in various places rented on a short-term basis. This inventory was then trucked to auction houses throughout the South and sold at prices substantially below wholesale. Many trucks were rented for this purpose. Wilson testified that one truck was purchased and that title was placed in Ward to conceal it from any bankruptcy proceedings.

By April 30, 1974, the FSFS store was completely emptied of furniture. On that day defendant-Slingerland, the nominal proprietor of FSFS, reported to city police that he had been robbed of $68,000 in cash. Some time prior to this alleged robbery, witness-Wilson told another witness that such a robbery would be claimed in order to account for the missing assets of FSFS. Although defendant-Slingerland reported the robbery to the police, he never provided a statement of the circumstances to them as requested. He explained at trial that this was because he did not care for the attitude of the police. The record indicates that the police seemed skeptical of his robbery report.

A petition for creditors for involuntary bankruptcy was filed against Wilson, Slingerland, and FSFS on May 10, 1974, and a receiver was appointed. On

June 27, 1974, an injunction was issued against defendants-Ward, Micciche, and Jarnigan forbidding them to dispose of any assets of FSFS. It is not clear when, if ever, the various defendants learned of these proceedings prior to the time criminal charges were brought against them.[1]

With respect to Ward and Slingerland, the testimony of witness-Wilson precludes any innocent interpretation of these facts. While it is true that Wilson's character was shown to be less than spotless, it is well settled that "a conviction can rest on the uncorroborated testimony of a co-defendant or accomplice." *United States v. Guy*, 456 F. 2d 1157, 1161 (8th Cir.), *cert. denied*, 409 U. S. 896 (1972); *Wood v. United States*, 361 F. 2d 802 (8th Cir. 1966). Further, Wilson's testimony was substantially corroborated. For example, the record shows that Wilson knew that Slingerland was planning a phony robbery some time prior to its occurrence. Other evidence in the record also serves to corroborate this direct testimony of an express conspiracy intended to defraud creditors and frustrate the bankruptcy laws.

The situation is quite different with respect to defendants-Jarnigan and Micciche. They were salesmen working for FSFS. Jarnigan also managed a branch of FSFS for a short time. Both were apparently extremely effective and successful as salesmen.

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[1]Slingerland admitted that he knew of the bankruptcy proceedings prior to his last attempt to auction FSFS furniture.

Although the Government concedes that Jarnigan and Micciche were not a part of the original conspiracy, it contends that they later joined the conspiracy. There is no direct evidence of this. Indeed, the Government witness, Wilson, testified that Jarnigan and Micciche were not involved in the scheme in any manner.

The Government relies upon four major pieces of evidence to implicate Jarnigan in the conspiracy. First, Jarnigan did buy a quantity of furniture from FSFS at a bargain price. However, Government witness-Wilson testified that this was a bona fide sale. He said that Jarnigan agreed to pay a substantial price and put down $900 in cash. Defendant-Slingerland also testified that this was an arm's length sale and that others had made similar purchases at a similar price. Further, the record contains a written receipt given to Jarnigan acknowledging the $900 payment. It is true that at one point, in talking to a policeman, Jarnigan did indicate that Slingerland would receive some of the profits of the sale of that furniture. However, this testimony is equivocal at best, since there was a substantial balance still owing to Slingerland.[2]

Second, Jarnigan was shown to have received a check for $465 that originated as proceeds from one of

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[2] The evidence that Jarnigan purchased a 41-acre farm was never related to the conspiracy. In view of the many commercial storage places used by the conspiracy, the inference, sought to be drawn by the prosecution, that the desire to conceal furniture motivated Jarnigan's purchase of the tract, rests upon mere conjecture.

the auction sales. However, the record reveals from disinterested testimony that this check had been delivered in blank to witness-Wilson, and Jarnigan's name and endorsement on the check were in a different ink. Wilson testified that this check represented a loan to Jarnigan.

Third, there is some evidence that Jarnigan admitted taking advantage of the confusion surrounding the collapse of FSFS to "steal" some furniture for his own purposes. The record, however, is unclear as to whether "steal" was Jarnigan's term or whether that was the conclusion of the witness. In any event, the fact that Jarnigan may have stolen furniture from FSFS does not show that he was a part of the general conspiracy, but rather indicates that he was working for his own purposes. Such a theft, if proven, would be a serious offense, but it is not the single conspiracy charged by this indictment.

Finally, the record shows that Jarnigan participated in taking FSFS furniture to various temporary storage places and from there to auctions. However, this, too, does not show knowledge of the scheme to disappear with the fruits of the auction thereby defrauding the creditors.

The case against Micciche is even weaker than that against Jarnigan. Basically, all that is shown is that Micciche participated in renting temporary storage facilities for the furniture and in transporting it to auctions. There was also some evidence that Micciche

purchased several cashier's checks for several thousand dollars during this period. However, the Government never tied the purchase of those cashier's checks in to the conspiracy itself.

It may be that Jarnigan and Micciche knew of the conspiracy. However, the indictment under which they were tried charges a knowing and intentional plan to conceal assets in contemplation of bankruptcy or to fraudulently transfer assets with the intent to defeat the bankruptcy laws. There is no evidence in this record from which a jury could find beyond a reasonable doubt that Jarnigan or Micciche knowingly and intentionally entered the conspiracy with the specific intent to defeat bankruptcy proceedings. The thrust of the evidence against these two might apply to any major employee of a distressed business. The rest, viewed cumulatively, is no more than suspicious and does not establish the essentials of an agreement with the principals to accomplish the unlawful objects as charged in the indictment which is necessary to sustain the conspiracy charge.

Accordingly, Nos. 75-1223 and 75-1224 are affirmed; Nos. 75-1220 and 75-1221 are reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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Counsel for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-911

FRANK DOUGLAS WARD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-912

JOHNNIE SLINGERLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence was insufficient to sustain their convictions.

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners, together with Paul Ray Jarnigan and Joseph Micciche, Sr., were convicted on one count of conspiring knowingly and fraudulently to transfer and conceal assets in contemplation of a bankruptcy proceeding, in violation of 18 U.S.C. 152 and

371.[1] Petitioner Ward was sentenced to four years' imprisonment and petitioner Slingerland to five years' imprisonment. The court of appeals affirmed (Pet. App.).

1. Government witness William Wilson, who pleaded guilty, testified that in October 1973 he and petitioners expressly agreed to defraud creditors by establishing good credit, ordering a large inventory, disposing of that inventory for whatever it would bring, and then disappearing (Tr. 262-266).[2] In December 1973, pursuant to the scheme, Factory Surplus and Freight Sales (FSFS), a furniture store, was established (Tr. 266-268). In April 1974, after experiencing an increasing business in inexpensive furniture sold at very low prices, a huge inventory began to arrive at FSFS. Much of the inventory was stored at locations rented on a short-term basis. The merchandise was then trucked to auction houses and sold at prices substantially below wholesale (Tr. 270-284). Many trucks were rented for this purpose. Wilson testified that one truck was purchased and title placed in petitioner Ward to protect it from bankruptcy proceedings (Tr. 268-269). Shortly before FSFS closed, an employee drove petitioner Slingerland to a branch of the bank used for the FSFS account to draw out its money.[3]

By April 30, 1974, the FSFS store was completely emptied of furniture (Tr. 63). On that day petitioner Slingerland, the nominal proprietor of FSFS, reported to the police that he had been robbed of $68,000 in cash (Tr. 270, 274, 389-394, 397-398).[4] The police asked him for

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[1]The court of appeals reversed the convictions of two co-defendants Jarnigan and Micciche, on the ground that the evidence was insufficient to show their participation in the conspiracy.

[2]"Tr." designates the transcript of the trial in the district court.

[3]Slingerland asked the employee to drive him so that the firm's creditors would not see him leave (Tr. 436).

[4]Prior to the alleged robbery, witness Wilson told another witness that such a robbery would be claimed to account for FSFS's missing assets.

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a statement of the circumstances of the robbery, which Slingerland never provided. He explained at trial that he failed to provide the police with the statement because he did not like their attitude (Tr. 808).

On May 10, 1974, creditors of Wilson, Slingerland and FSFS filed a petition for involuntary bankruptcy, and a receiver was appointed (Tr. 236). Petitioners, however, proceeded to dispose of FSFS merchandise at public auction. On May 11, 13, and 20, 1974, auctions arranged by Ward were held; petitioner Slingerland was present and assisted Ward at two of the auctions (Tr. 201-202, 204-205). The auctions brought in approximately $17,000, which Ward shared with Wilson and Slingerland (Tr. 202-203, 276-277). On May 28, 1974, another auction was held at which Slingerland, Ward and Wilson were present; a total of $17,675.50 was realized and was split among the three (Tr. 277-278, 509-510). An injunction prohibiting petitioner Ward from disposing of assets was issued June 27, 1974 (Tr. 237).

Petitioners testified in their own behalf and denied participating in any fraudulent scheme (Tr. 607-685, 749-825).

2. Viewed in the light most favorable to the government,[5] the evidence was sufficient to sustain the convictions. As the court of appeals stated (Pet. App. 4):

> With respect to Ward and Slingerland, the testimony of witness-Wilson precludes any innocent interpretation of these facts. While it is true that Wilson's character was shown to be less than spotless, it is well settled that "a conviction can rest on the uncorroborated testimony of a co-defendant or accomplice." *United States* v. *Guy*, 456 F.2d 1157, 1161 (8th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Wood* v. *United States*, 361 F.2d 802 (8th Cir. 1966). Further, Wilson's testimony was substantially corrob-

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[5] *Hamling* v. *United States*, 418 U.S. 87, 124; *Glasser* v. *United States*, 360 U.S. 60, 80.

THROUGH

orated. For example, the record shows that Wilson knew that Slingerland was planning a phony robbery some time prior to its occurrence. Other evidence in the record also serves to corroborate this direct testimony of an express conspiracy intended to defraud creditors and frustrate the bankruptcy laws.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

DOJ-1976-03

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IN THE

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Johnnie Slingerland ..... *Petitioner*

Frank Douglas Ward ..... *Petitioner*

V. No. 75-911
No. 75-912

United States of America ..... *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court Of The United States

Johnnie Slingerland ..... *Petitioner*

Frank Douglas Ward ..... *Petitioner*

V. No. 75-911
No. 75-912

United States of America ..... *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of it's order of March 22, 1976, denying the petition for Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled cases as prayed for in the petitions filed December 29, 1975, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. To allow the convictions of petitioners to stand, without a complete review of the record below, is

to deny petitioners their constitutional guarantees of a fair trial. The 14th Amendment to the Constitution of the United States of America guarantees that a citizen will be protected against arbitrary judicial policies and practices which are designed to deny citizens a right of review and full protection of the law and the evidence of a particular situation. To deny certiorari to petitioners is, in effect, upholding an arbitrary and capricious court policy, the policy of the Eighth Circuit Court of Appeals, that allows an accused to be convicted solely on the uncorroborated testimony of an alleged co-conspirator. This policy clearly violates the Due Process Clause of the 14th amendment.

To say that petitioners herein are not entitled to a review of the record below is in effect encouraging perjured testimony and furthers the practice of one individual to make a "deal" for himself, testifying as to whatever facts he may choose to testify to, allowing a conviction to stand solely on the uncorroborated and unsupported testimony of a perjured witness.

The Eighth Circuit Court of Appeals arbitrarily picked out testimony that they chose to believe and discounted testimony it did not want to believe when the court reversed the conviction of two alleged co-conspirators and affirmed the convictions of petitioners herein, when in effect if one was guilty, all were guilty. To say that you can be part of the conspiracy but not be guilty of conspiracy because one only did certain small acts, and at the same time hold that another is guilty of conspiracy by committing the

same or similar act, clearly denies to the one the full protection of the law as granted by the 14th Amendment.

To deny certiorari to petitioners herein has the same effect as encouraging the lower courts to cast aside their judicial responsibility and allow the lower Court to make arbitrary and capricious findings when in fact those findings therein are not supported by the greater weight of the evidence and certainly when the decision is not supported by a weight of evidence overcoming the burden of proof beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above, and in the petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, Writ of Certiorari issue to the Court of Appeals for the Eighth Circuit Court, resubmitted.

Respectfully submitted,

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(501) 375-5566

Counsel for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is performed in good faith and not for delay and is restricted to grounds specified in Rule 58, of the rules of this court.

Counsel for Petitioners